In the matter of an oral application by Dato' Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEALS NO W-05-26 OF 1999 AND W-05-27 OF 1999
LAMIN PCA, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
2 MARCH 2000

Criminal Procedure *— Judge — Disqualification — Accused involved in making representations to Conference of Rulers where appointment of judge was in question — Whether real likelihood of bias — Federal Constitution art 122B(1)*

During the course of the hearing of the appeal before the Court of Appeal, the appellant requested for permission to address the court himself. The appellant claimed that in his capacity as the Deputy Prime Minister, he had represented the Prime Minister, to the Conference of Rulers in which the appointment of Mokhtar Sidin J (as he then was) to the bench of the Court of Appeal was in question, as the Conference of Rulers were not in agreement with the Prime Minister's advice with regard to the appointment. In light of that, the appellant made an oral application to disqualify Mohktar Sidin JCA from the quorum hearing the present appeal on the ground that there might be a likelihood of bias on the judge's part.

Held, dismissing the application:

(1) By virtue of art 122B(1) of the Federal Constitution, the Prime Minister could insist on the appointment of a judge even if the Conference of Rulers did not agree or withheld its views or delayed the giving of its advice to the Yang di-Pertuan Agong. Likewise the Prime Minister need not respond to a request from the Conference of Rulers for revocation of an appointment or to revoke an appointment which has already made (see p 484H–I).

(2) The subject matter which was purported to have been expressed by the Conference of Rulers in the nature of an advice could not be held against Mokhtar Sidin JCA because the Yang di-Pertuan Agong was not bound to accept that advice. Further the content of the advice had nothing to do with the hearing of the case in this court and the role played by the appellant at the Conference of Rulers had no bearing on the present appeals before the court (see p 485A–B).

(3) The appointment of judges was a matter between the Yang di-Pertuan Agong and the Prime Minister personally and it was not the concern of the Deputy Prime Minister. Whatever opinion or views expressed by the Deputy Prime Minister at the Conference had to be assumed in law to be the opinion or views of the Prime Minister. In the case of Mokhtar Sidin JCA, the appointment had been made and could no longer be the subject of further

argument. Should there have been any adverse comments against Mokhtar Sidin JCA in the process, they were of no consequence. Further, since the deliberations in the official meeting of the Conference of Rulers were held in secrecy, they should remain so (see p 485B–D).

Per curiam:

Anyone appearing in court with his counsel should consult his counsel before making any application or saying anything. The person should also say whatever he wished to say through his counsel because he could be charged for contempt if something contemptuous was uttered or expressed in court (see p 485E–F).

[Bahasa Malaysia summary

Semasa perbicaraan rayuan di hadapan Mahkamah Rayuan, perayu memohon kebenaran untuk berhujah sendiri kepada persidangan mahkamah. Perayu mendakwa bahawa sebagai Timbalan Perdana Menteri, beliau pernah mewakili Perdana Menteri dalam Majlis Raja-Raja yang membincangkan tentang perlantikan Mokhtar Sidin J (kedudukannya pada ketika itu) sebagai anggota kehakiman Mahkamah Rayuan, disebabkan oleh Majlis Raja-Raja tidak bersetuju dengan saranan Perdana Menteri berhubung dengan perlantikan tersebut. Berdasarkan perkara tersebut, perayu telah membuat permohonan secara lisan untuk menggugurkan Mokhtar Sidin HMR daripada korum perbicaraan rayuan ini atas sebab kemungkinan berlakunya pertimbangan berat sebelah di pihak hakim tersebut.

Diputuskan, menolak permohonan tersebut:

(1) Disebabkan oleh perkara 122B(1) Perlembagaan Persekutuan, Perdana Menteri boleh mendesak perlantikan seseorang hakim itu walaupun Majlis Raja-Raja tidak bersetuju ataupun enggan memberikan pandangan atau lengah dalam memberikan saranannya kepada Yang di-Pertuan Agong. Begitu juga Perdana Menteri tidak perlu memberikan apa-apa respons ke atas permintaan Majlis Raja-Raja bagi pembatalan satu-satu perlantikan atau membatalkan perlantikan yang telah dibuat (lihat ms 484H–I).

(2) Perkara yang berupa penyataan Majlis Raja-Raja dalam bentuk saranan tidak boleh digunakan untuk menentang Mokhtar Sidin HMR kerana Yang di-Pertuan Agong bebas untuk tidak menerima saranan tersebut. Tambahan pula, kandungan saranan tersebut tidak ada kena mengena dengan perbicaraan kes di mahkamah ini dan peranan perayu di Majlis Raja-Raja tidak mempunyai sebarang kaitan dengan rayuan sekarang di hadapan mahkamah ini (lihat ms 485A–B).

(3) Perlantikan para hakim merupakan hal antara Yang di-Pertuan Agong dan Perdana Menteri secara peribadi dan bukan urusan Timbalan Perdana Menteri. Apa saja pendapat atau pandangan yang dilahirkan oleh Timbalan Perdana Menteri di Majlis Raja-Raja hendaklah dianggap di sisi undang-undang sebagai pendapat atau pandangan Perdana Menteri. Sekiranya timbul ulasan yang memburuk-burukkan Mokhtar Sidin HMR di dalam proses perlantikan tersebut, ulasan tersebut tidak akan menimbulkan sebarang kesan. Tambahan lagi, oleh kerana perbincangan di dalam pertemuan rasmi Majlis Raja-Raja diadakan secara sulit, ia harus dikekalkan sedemikian (lihat ms 485B–D).

Per curiam:

Mana-mana orang yang hadir di mahkamah bersama peguam yang mewakilinya perlu berunding dengan peguamnya terlebih dahulu sebelum membuat apa-apa permohonan atau berucap sesuatu. Apa saja yang ingin diucapkan hendaklah disampaikan melalui peguamnya kerana sekiranya ucapan atau percakapannya penuh dengan penghinaan dia boleh dikenakan tindakan menghina mahkamah (lihat ms 485E–F).

Notes

For cases on judges generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1586–1599.

Legislation referred to

Federal Constitution arts 40(1A), 122B(1), 159(5)

Appeal from: Criminal Trials No 45–48 of 1998 and 45–49 of 1998 (High Court, Kuala Lumpur)

Raja Aziz Addruse (*Aris Rizal Christopher Fernando*, *Gurbachan Singh*, *Pawancheek Merican*, *Sankara N Nair* and *Zulkifli Nordin* with him) (*SN Nair & Partners*) for the appellant.

Abdul Gani Patail (*Azahar Mohamed*, *Mohd Yusof Zainal Abidin*, *Tun Abdul Majid Tun Hamzah*, *Nordin Hassan* and *Shamsul Sulaiman* with him) (Attorney General's Chambers) for the respondent.

Lamin PCA (delivering ruling of the court in open court):

The appointment of judges to the High Court, Court of Appeal and the Federal Court

Before we make known of our decision regarding the application made to us by the appellant yesterday the effect of which whether this quorum should continue to sit with or without Mokhtar Sidin JCA, we feel we should explain the relevant provision of the Federal Constitution ('the Constitution') relating to the appointment of judges of the High Court, of

the Court of Appeal and of the Federal Court. That provision is art 122B(1) and it reads: A

> The Chief Justice of the Federal Court the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to art 122C) the other judges of the Federal Court, of the Court of Appeal and of the High Courts shall be appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers. B

The intention of this article is clear ie the Yang di-Pertuan Agong must act on the advice of the Prime Minister. However, the Yang di-Pertuan Agong is required to *consult* the Conference of Rulers before making the appointment. To consult means to refer a matter for advice, opinion or views. For a quick reference as to the meaning of this word, I refer to the C *Black's Law Dictionary* (7th Ed), which is the latest edition, the word 'consultation' carries the meaning inter alia thus:

> The act of asking the advice or opinion of someone ... consult vb.

To 'consult' does not mean to 'consent'. The Constitution uses the words D 'consent' and 'consult' separately. For example the word 'consent' is used in art 159(5) of the Constitution which states that the amendments to certain provisions of the Constitution cannot be passed by Parliament without the 'consent' of the Conference of Rulers. The *Black's Law Dictionary* provides for the meaning of the word 'consent' thus, '*Agreement, approval or permission as to some act or purpose especially given voluntarily by a* E *competent person.*'

So in the matter of the appointment of judges, when the Yang di-Pertuan Agong *consults* the Conference of Rulers, he does not seek its 'consent'. He merely consults. So when the Conference of Rulers gives its advice, opinion or views, the question is, is the Yang di-Pertuan Agong bound to accept. Clearly he is not. He may consider the advice or opinion F given but he is not bound by it. But art 40(1A) of the Constitution provides specifically as to whose advice the Yang di-Pertuan Agong must act upon. Clause (1A) of article 40 reads:

> In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice on advice or G after considering advice the Yang di-Pertuan Agong shall accept and act in accordance with such advice.

Clearly therefore the Yang di-Pertuan Agong must act upon the advice of the Prime Minister. The advice envisaged by art 40(1A) is the direct advice given by the recommender and not advice obtained after consultation. H

So in the context of art 122B(1) of the Constitution, where the Prime Minister has advised that a person be appointed a judge and if the Conference of Rulers does not agree or withholds its views or delays the giving of its advice with or without reasons, legally the Prime Minister can insist that the appointment be proceeded with. Likewise in the case of a request from the Conference of Rulers for revocation of an appointment or I an advice from it to revoke an appointment already made, the Prime Minister need not respond.

What we want to impress here in the light of the information given to us by the appellant yesterday ie something purportedly to have been expressed by the Conference of Rulers in the nature of an advice cannot be held against Mokhtar Sidin JCA for the Yang di-Pertuan Agong is not bound to accept that advice. Further the content of the advice has nothing to do with the hearing of a case in this court. We consider the role played by the appellant at the Conference of Rulers has no bearing on the present appeals before us. In the final analysis in the matter of the appointment of judges, it is really a matter between the Yang di-Pertuan Agong and the Prime Minister personally. It does not even become the concern of the Deputy Prime Minister. Therefore whatever opinion or views expressed by the Deputy Prime Minister at the Conference, it must, be assumed in law that it is the opinion or views of the Prime Minister. In the case of Mokhtar Sidin JCA, the appointment was made and he is here. The appointment can no more be the subject of further argument. Should there have been adverse comments against him in the process, they are of no consequence. Further if we may impress that since the deliberations in the official meeting of the Conference of Rulers were held in secrecy, they should remain where they are for all time.

For the purpose of the present proceedings, I have asked Mokhtar Sidin JCA how he feels towards the appellant. He has said to me and my colleague that he has nothing against him. We are convinced. He has given the assurance that he will perform his function and discharge his duties as a judge without fear or favour in order to serve the ends of justice. It must be borne in mind that the present cases before us are in the nature of appeals and we, as appellate judges have only to rely on the records before us.

May we take this opportunity also to advise anyone appearing in court with counsels before he wishes to make any application or to say anything, he must consult his counsels and to say whatever he wishes to say through his counsels so as to avoid any unpleasant situation. For example, if he utters or expresses something contemptuous in court, he can be charged for contempt. Such a situation can be avoided if he has consulted his counsels.

With that note we have decided that this same quorum will continue the hearing of the present appeals.

Application dismissed.

Reported by Chin En Tek